

1 UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF VIRGINIA
3 ALEXANDRIA DIVISION

4 ROSY GIRON DE REYES,)
5 et al,) Civil 16-563
6 Plaintiffs,)
7 v.)
8 WAPLES MOBILE HOME PARK) Alexandria, Virginia
9 LIMITED PARTNERSHIP,) September 23, 2020
et al,)
Defendants.)
_____)

10 TRANSCRIPT OF MOTION HEARING
11 VIA ZOOM

12 BEFORE THE HONORABLE T. S. ELLIS
13 UNITED STATES DISTRICT JUDGE

14
15 APPEARANCES:

16 For the Plaintiffs: Simon Yehuda Sandoval-Moshenberg
17 Gianna Puccinelli
18 Nady Peralta
Matthew Traupman

19 For the Defendants: Michael Sterling Dingman
20 Grayson Hanes
21 Justin deBettencourt
Grayson Hanes

22 Court Reporter: PATRICIA A. KANESHIRO-MILLER, RMR, CRR
23

24 Proceedings reported by stenotype shorthand.
25 Transcript produced by computer-aided transcription.

P R O C E E D I N G S

(4:06 p.m.)

THE DEPUTY CLERK: The Court calls Civil Case Number 2016-CV-563, Rosy Giron De Reyes, et al., versus Waples Mobile Home Park Limited Partnership, et al.

May I have appearances please, first for the plaintiff.

MR. SANDOVAL-MOSHENBERG: Good afternoon, Your Honor. This is Simon Sandoval-Moshenberg from the Legal Aid Justice Center. Also here is Nady Peralta from the Legal Aid Justice Center, pro hac vice counsel Gianna Puccinelli and Matthew Traupman from the law firm Quinn Emanuel.

Ms. Puccinelli will be arguing the motion this afternoon, and then I will be handling the pretrial.

THE COURT: Would you spell her name, please, for the court reporter.

MR. SANDOVAL-MOSHENBERG: Yes, Your Honor. It is P-U-C-C-I-N-E-L-L-I.

THE COURT: Good afternoon to all of you, especially Ms. Puccinelli, since she will be arguing.

Who is on, on behalf of the defendants?

MR. DINGMAN: Good morning, Your Honor. Michael Dingman, Justin deBettencourt, and Grayson Hanes are on for the defendants. And I will be arguing for the defendants this afternoon.

1 THE COURT: All right. Sir, your name again, please?
2 And spell it.

3 MR. DINGMAN: It is Michael Dingman, D-I-N-G-M-A-N.

4 THE COURT: All right. Thank you.

5 I'll give you an outline here. But I ask that when
6 you speak, make clear at the outset your name so that the
7 court reporter can properly attribute your remarks.

8 Now, the way we're going to do this -- this is a
9 motion for clarification -- I'm going to say a few words
10 about what I understand to be the request for clarification,
11 and then I will hear first from you, Mr. Dingman, because
12 you're the movant, and then we'll hear from Ms. Puccinelli.
13 After that, I will take a brief recess to consider your
14 arguments and then tell you what I intend to do after that.

15 Let me give you a brief summary here. This case now
16 started about four years ago. Eight current and former
17 Latino residents of Waples Mobile Home Park brought this Fair
18 Housing Act lawsuit against the owners and operators of the
19 park, challenging the defendant's policy requiring all adults
20 seeking to live at the park to provide documentation
21 evidencing legal status in the United States at the time of
22 application or lease renewal. The policy has changed a bit
23 over time. It requires both lessee and non-lessee applicants
24 to provide an original U.S. Social Security card or
25 combination of documents together to provide evidence of

1 legal status in the United States.

2 Now, there was a decision on defendants' motion to
3 dismiss and the parties' cross motions for summary judgment,
4 and the plaintiff appealed to the Fourth Circuit.

5 Let me be a little more specific about that.
6 Defendants originally moved to dismiss count one, arguing
7 that the complaint failed to state a claim under the FHA.
8 And on September 1st of 2016, I issued an order denying
9 defendants' motion to dismiss count one. And in a memorandum
10 opinion accompanying that order, I said that count one
11 withstood a motion to dismiss under disparate treatment
12 theory but the disparate impact theory could not serve as a
13 stand-alone theory in a case where plaintiffs could use the
14 theory to show defendants' apparently neutral policy was, in
15 fact, pretext, and that opinion was published.

16 Both parties then moved for summary judgment on count
17 one. Defendants based their motion for summary judgment on
18 the disparate treatment theory; whereas, plaintiffs addressed
19 the disparate impact theory.

20 At oral argument and by order issued shortly
21 thereafter, the parties were informed that the disparate
22 impact theory would not be considered as a stand-alone theory
23 on summary judgment because the theory had been previously
24 rejected.

25 An order issued on April 18th granting the

1 defendants' motion for summary judgment on count one under
2 the disparate treatment theory, and that was appealed.

3 On appeal the Fourth Circuit vacated the judgment of
4 the District Court and remanded for consideration of the
5 cross-motions for summary judgment under the plaintiffs'
6 disparate impact theory of liability in a manner as the
7 Fourth Circuit said consistent with this opinion. In
8 reaching this conclusion, the Fourth Circuit first determined
9 that the overarching question on appeal was whether the
10 District Court erred in granting Waples's motion for summary
11 judgment because it did not consider plaintiffs' disparate
12 impact theory of liability at this stage. And then the
13 Fourth Circuit said it deemed it necessary to evaluate both
14 whether the District Court erred in functionally dismissing
15 plaintiffs' disparate impact theory at the motion to dismiss
16 stage and whether the District Court erred in granting
17 Waples's motion for summary judgment on the FHA claim because
18 it did not consider plaintiffs' disparate impact theory of
19 liability at this stage.

20 So, then, the Fourth Circuit outlined a three-step
21 burden-shifting framework for analyzing the disparate impact
22 claims. At the first step, the plaintiffs had to demonstrate
23 a robust causal connection between defendants' challenged
24 policy and the disparate impact on the protected class. And
25 then there was discussion about that at the Fourth Circuit.

1 I'm not going to reiterate that here. But the Fourth Circuit
2 made clear what the first, second, and third steps were. And
3 at the first step, the Fourth Circuit found that the
4 plaintiffs had satisfied the robust causality requirement
5 because plaintiffs plausibly alleged that the specific
6 practice causes a disproportionate number of Latinos to face
7 eviction from the park compared to the number of non-Latinos
8 who face eviction based on that policy.

9 And so I'm not going to go through the portions of
10 the Fourth Circuit's opinion that make that clear. But then
11 after the Fourth Circuit's remand, the defendants -- not the
12 plaintiffs -- but the defendants filed a motion for summary
13 judgment, and they argued that summary judgment was
14 appropriate on steps one, two, and three at the three-step
15 test. And the plaintiffs filed an opposition arguing that it
16 is impermissible to litigate step one on summary judgment
17 because the Fourth Circuit determined that the plaintiffs
18 satisfied their burden at that step.

19 A hearing on the defendants' motion for summary
20 judgment was held in November of 2018, and an order issued
21 stating that the task on remand was to consider steps two and
22 three on summary judgment. The parties were instructed to
23 submit supplemental briefing to address whether the order had
24 identified the correct issues on remand. The parties
25 complied.

1 And then, on August 19, 2020 -- which is the order
2 that is at issue today -- I issued an order denying
3 defendants' motion for summary judgment. This order
4 concluded that there were genuine issues of material fact as
5 to steps two and three and did not expressly address step
6 one.

7 Defendant thereafter filed a motion for
8 reconsideration, seeking clarification and consideration of
9 the August 19th order. And essentially the defendants asked
10 for clarification on whether the August 19th order decided
11 defendants' step one argument, which step one issues remain
12 for trial; whether prior findings of fact will be treated as
13 undisputed for purposes of any trial; and whether undisputed
14 material facts presented in the defendants' motion for
15 summary judgment are deemed admitted.

16 Well, obviously, what the defendants are asking for
17 goes well beyond reconsideration. It's really sort of about
18 having the pretrial. But in any event, I do understand that
19 is what the defendants want, as they put it, to be clarified.
20 As I just pointed out, that's not asking to clarify the
21 order; it's asking for the Court to do some pretrial work
22 that wasn't presented in that order.

23 In any event, that's what we're here for today, to
24 determine whether the August 19th order really requires the
25 clarification that the defendants are seeking.

1 Now, what we're going to do is this: I'm going to
2 give the defendants, Mr. Dingman, an opportunity to tell me
3 why he thinks there should be a motion for reconsideration;
4 and then I'll have Ms. Puccinelli respond; and then I will
5 take a recess to consider your arguments.

6 It's very difficult to ask questions during counsel's
7 argument during a telephonic argument because you don't hear
8 when I might interrupt, as I would. So you'll have
9 essentially an unfettered opportunity. I will save
10 questions, if I have any, for a period after the recess if I
11 think it's necessary.

12 All right. Mr. Dingman, you may go first. And
13 remember, please, identify yourself before you begin your
14 argument. You'll have roughly 20 minutes. If you need
15 longer, of course I'm going to give it to you, but I would
16 like for you to be as succinct and direct as possible.

17 Mr. Dingman.

18 MR. DINGMAN: Thank you, Your Honor.

19 This is Michael Dingman for the defendants.

20 And as you pointed out, Your Honor, we're here on
21 defendants' motion for reconsideration and clarification of
22 the Court's ruling on defendants' motion for summary
23 judgment. And there are two parts to that motion. One is
24 asking the Court to reconsider the decision that's set forth
25 in that order, and also seeking clarification of whether and

1 to what extent the Court addressed the step one arguments
2 that were raised by the defendants in their summary judgment
3 motion.

4 With respect to step one of the analysis, I'd like to
5 walk the Court through the arguments that were presented at
6 summary -- in defendants' summary judgment motion and why we
7 believe that the Court should grant summary judgment based on
8 those arguments or, in the alternative, clarify whether it's
9 denied summary judgment as to step one and what issues would
10 remain for determination at trial with respect to step one of
11 the analysis.

12 In defendants' motion for summary judgment,
13 defendants argue that the anti-harboring statute, which is
14 found at 8 U.S.C. 1324, required the dismissal of this case
15 at summary judgment because it demonstrates that the policy
16 is not arbitrary, artificial, or unnecessary. And it also
17 demonstrates that there is little choice for the defendants
18 but to implement the policy to avoid the potential criminal
19 liability that flows from the anti-harboring statute, as
20 discussed by the Fourth Circuit in *United States v. Aguilar*.

21 Turning to the first argument, Your Honor, it is
22 clear from *Inclusive Communities* that the Supreme Court
23 required a demonstration that the policy being challenged is
24 shown to be arbitrary, artificial, and unnecessary. The
25 Supreme Court said the following: "Private policies are not

1 contrary to the disparate impact requirement unless they are
2 artificial, arbitrary, and unnecessary barriers."

3 Following that decision, the Eighth Circuit, in *Ellis*
4 *v. City of Minneapolis*, said the following: "Under *Inclusive*
5 *Communities*, a plaintiff must, at the very least, point to an
6 artificial, arbitrary, and unnecessary policy causing the
7 problematic disparity."

8 In our motion for summary judgment, the defendants
9 pointed out the impact of the anti-harboring statute and the
10 decision in *U.S. v. Aguilar* as a basis for this policy and
11 demonstrating that it's not arbitrary, artificial, and
12 unnecessary. We have talked quite a bit in this case about
13 the *Aguilar* matter. It is the only Fourth Circuit decision
14 regarding criminal liability that we're aware of with respect
15 to the anti-harboring statute. In that case, *Aguilar* was
16 convicted of violating that statute because the Fourth
17 Circuit found that she acted with reckless disregard because
18 she was aware of facts and circumstances indicating that
19 individuals she was renting to were undocumented. And the
20 Court found that she took no steps to ascertain the status of
21 her tenants. Because of those two issues, she was found
22 criminally liable under the anti-harboring statute.

23 It is undisputed here that Waples are aware of
24 circumstances demonstrating that illegal aliens are residing
25 at the park. Plaintiffs make that very allegation

1 themselves. Based on *United States v. Aguilar*, Waples cannot
2 ignore and do nothing what it already has knowledge of with
3 respect to the possibility that illegal aliens are residing
4 at the park. And so it has a policy that is very
5 straightforward. Anyone who wants to reside at the park
6 simply must provide proof that they're in the United States
7 legally. That's all they have to do. And that would protect
8 Waples and the defendants from possible criminal prosecution
9 under the anti-harboring statute.

10 When this Court considered this issue previously in
11 summary judgment, the Court held the following:

12 "There is no question, given Section 1324's
13 imposition of liability for reckless disregard of the fact
14 that an alien has come to, entered or remains in the United
15 States in violation of law that a lessor could properly and
16 sensibly inquire into the immigration status of the lessee
17 and his adult cohabitants."

18 That finding by the Court was not challenged on
19 appeal. It's the law in the case. So this Court itself has
20 already determined that the anti-harboring statute provides a
21 significant basis for this policy, which demonstrates that
22 the policy is not arbitrary, artificial, or unnecessary.
23 Therefore, the plaintiffs fail at the step one stage.

24 Additionally, in *Inclusive Communities*, the Supreme
25 Court stated that a defendant cannot be found liable under

1 the Fair Housing Act for disparate impact if the federal
2 government has effectively tied the hands of the defendant
3 and they have no meaningful choice.

4 What the Supreme Court stated is, it will not place
5 someone like the defendants in a, quote, double bind of
6 liability. In this instance, criminal liability.

7 The policy is necessary to comply with the
8 requirements of the anti-harboring statute, as interpreted by
9 the Fourth Circuit. Therefore, defendants cannot be found
10 liable at the step-one stage for complying with what the
11 federal government has imposed. That is clear from the
12 decision in *Inclusive Communities*.

13 Carrying forward with the anti-harboring statute,
14 Your Honor, it also demonstrates that defendants are entitled
15 to summary judgment at steps two and three. Step two, of
16 course, requires the defendants to demonstrate that they have
17 a valid interest in that policy. Again, this Court has
18 already found --

19 THE COURT: Excuse me. Can I --

20 MR. DINGMAN: Yes, sir.

21 THE COURT: I didn't want to interrupt, but I thought
22 we were focusing on step one, that was the remand. Am I
23 correct?

24 MR. DINGMAN: Well, the summary judgment focused on
25 steps one, two, and three.

1 THE COURT: Well, I was wrong about that. I'm sorry.
2 The Fourth Circuit decided that the causation requirement was
3 adequately met. I don't recall that the Fourth Circuit said
4 anything, as you point out, about the anti-harboring statute.

5 Did you argue it in the Fourth Circuit?

6 MR. DINGMAN: This is Michael Dingman, Your Honor,
7 for the record.

8 The Fourth Circuit makes no mention of the
9 anti-harboring statute anywhere in its opinion.

10 THE COURT: I didn't ask you that. I asked you: Did
11 you argue the anti-harboring act in the Fourth Circuit?

12 MR. DINGMAN: We argued that the Court was correct at
13 the motion to dismiss stage based on the anti-harboring
14 statute --

15 THE COURT: Let me --

16 MR. DINGMAN: I'm sorry?

17 THE COURT: Let me ask you specifically: Did you
18 argue that step one could not be satisfied because the
19 anti-harboring statute provided a justification for their
20 asking for that proof?

21 MR. DINGMAN: That was one of the arguments
22 presented, yes.

23 THE COURT: And that's in your brief in the Fourth
24 Circuit?

25 MR. DINGMAN: We raised the anti-harboring statute in

1 our briefs to the Fourth Circuit.

2 THE COURT: And did you argue it orally?

3 MR. DINGMAN: I don't recall that issue coming up at
4 oral argument.

5 THE COURT: But you say -- and I think you're
6 correct -- that the anti-harboring statute is not mentioned
7 in the Fourth Circuit's opinion.

8 MR. DINGMAN: That's correct.

9 THE COURT: All right. Finish your argument, please.

10 MR. DINGMAN: Thank you, Your Honor.

11 Before I do that, I want to address one other
12 issue -- and maybe I misunderstood the Court's statement --
13 but the Fourth Circuit -- and we'll get to this in more
14 detail -- did not determine that the plaintiffs have
15 satisfied step one based on any evidence. The Fourth Circuit
16 determined that they had alleged sufficient allegations in
17 their complaint to survive a motion to dismiss. That's as
18 far as the Fourth Circuit went in its decision. I will come
19 back to that in more detail.

20 Returning to the anti-harboring statute and *Aguilar*
21 argument -- now, we will come back to step one argument -- I
22 just wanted to carry through the anti-harboring statute
23 argument, Your Honor, to steps two and three because we
24 believe the Court should also reconsider the denial of
25 summary judgment as to steps two and three. Again, the Court

1 has already found that avoiding criminal liability under the
2 anti-harboring statute is valid interest. So that satisfied
3 step two. In step three, the burden now shifts to the
4 plaintiffs to demonstrate that there is some other policy
5 that can satisfy that same concern. And all that they have
6 offered -- and this is in the Court's order -- is to say that
7 only lessees should be required to provide proof of legal
8 residency, not adult cohabitants. But that is contrary to
9 the anti-harboring statute. There is no distinction between
10 knowing that a lessee or somebody residing with a lessee may
11 be in the United States illegally from a criminal point of
12 view. If either is the case, then Waples is subject to
13 criminal prosecution, and that is why, I believe, the Court
14 referred in its prior decision that it's sensible to inquire
15 into the immigration status of both lessees and adult
16 cohabitants. Therefore, the undisputed facts demonstrate
17 that steps two and three also require summary judgment in
18 favor of the defendants.

19 Additionally, Your Honor, we argued at the step one
20 stage that the statistical basis for step one predicated upon
21 the opinions of Professor Clark also require the grant of
22 summary judgment because his opinions are unreliable. And
23 the basis for that argument, Your Honor, is quite simple.
24 Professor Clark's opinions are based on a statistical
25 analysis for which he determined no margin of error, and he

1 agrees, and it is a basic statistical concept that the
2 reliability of any statistical analysis is determined by the
3 margin of error. What Professor Clark did is used statistics
4 from the Center for Migration Studies to estimate the number
5 of illegal aliens in the census tract in which the park is
6 located.

7 CMS, however, does not provide a margin of error
8 below its estimates at the national level. Professor Clark
9 did nothing to determine the margin of error for his estimate
10 of the illegal aliens at the census tract level which has a
11 population of a little over 3,000 people. What he did,
12 instead, was apply the margin of error for the American
13 Community Study, which is done by the Census Bureau, of the
14 entire Hispanic population, not the legal population. And
15 Professor Clark admitted himself that the illegal population
16 is much more difficult to track and to estimate because of
17 the obvious reason they don't want to be tracked. He applied
18 that margin of error from the ACS study to all Hispanics
19 through his estimate of the illegal aliens in the census
20 tract with no modification. So there is no margin of error
21 determined by Professor Clark. Without a margin of error,
22 there is no basis to determine the reliability of his
23 opinions. Because the plaintiffs fail to show the
24 statistical requirements at step one, summary judgment should
25 be granted in favor of the defendants.

1 The last issue I want to cover on summary judgment as
2 far as the substantive arguments, Your Honor -- and then I
3 will deal with the Fourth Circuit's decision -- is also a
4 step two and step three analysis. The defendants have
5 proffered that one of the other reasons for the policy, in
6 addition to avoiding criminal prosecution, is to conduct a
7 criminal background check of people who will live at the
8 park. We have an expert, George Caruso, who is unopposed,
9 who opined that this is a reasonable and standard policy.
10 That satisfies step two. In response, the plaintiffs say the
11 same thing they said with respect to the anti-harboring
12 statute, which is, well, you can do a criminal background
13 check on the lessees only. Well, that is clearly not
14 sufficient because there will be any number of adults living
15 at the park for whom no criminal background check would be
16 performed. So that also requires that this Court grant
17 summary judgment to the defendants.

18 Now, in response, Your Honor, one of the primary
19 arguments made by the plaintiffs is that the Fourth Circuit
20 granted them partial summary judgment as to step one, which
21 would mean that without ever mentioning the anti-harboring
22 statute, the Fourth Circuit would have rejected the arguments
23 made by the defendants and that the Fourth Circuit would have
24 determined that Professor Clark's opinion is correct and
25 defendants' expert, Dr. Weinberg's, are wrong, though there's

1 no mention in the Fourth Circuit's decision about the
2 anti-harboring statute, about Professor Clark, or about
3 Professor Weinberg. And the plaintiffs have represented to
4 this Court on numerous occasions that there are fact issues
5 to be tried at the step one stage, in particular with respect
6 to the dispute between Professor Clark and Professor
7 Weinberg. They said that to the Fourth Circuit, and then
8 they said that to you in their opposition to the motion for
9 summary judgment, where they actually cite cases to say that
10 an expert dispute must be decided by the trier of fact. But
11 now they argue to this Court that the statistical factual
12 dispute was somehow resolved by the Fourth Circuit. There is
13 absolutely no basis for that argument in the Fourth Circuit's
14 opinion.

15 What is clear from the Fourth Circuit's opinion is
16 that it granted the relief that was requested by the
17 plaintiffs. The plaintiffs did not appeal the Court's denial
18 of their cross motion for summary judgment. The plaintiffs
19 did not request that they be granted partial summary
20 judgment. They appealed the dismissal of the disparate
21 impact claim at the motion to dismiss stage. That is
22 precisely what they said in their briefs to the Fourth
23 Circuit, and that is precisely what the Fourth Circuit stated
24 it was going to decide, as Your Honor quoted in your opening
25 statements. And when you look at the Fourth Circuit's

1 opinion, it is clear beyond any argument that they did not
2 take the step without ever saying the words "partial summary
3 judgment" and decided substantive fact issues in this case.
4 When they talked about their decision, this is what they
5 state, and this starts at page 148 of their case:

6 "In their complaint, plaintiffs allege that this
7 particular policy violates the FHA because it is
8 disproportionately ousting Hispanic or Latino families from
9 their homes and denying them one of the only affordable
10 housing options in Fairfax County, Virginia." It refers to
11 joint appendix page 27, which is the complaint.

12 The Court then says, in their complaint, "Plaintiffs
13 provided statistical evidence that Latinos constitute 64.6
14 percent of the total undocumented population," and the Court
15 goes on to quote the rest of those statistics from the
16 complaint.

17 The Court then says the following:

18 "At the motion to dismiss stage, we must accept all
19 well-pled facts as true and draw all reasonable inferences in
20 favor of the plaintiff. Therefore, accepting these
21 statistics as true, we conclude that the plaintiffs
22 sufficiently alleged a prima facie case of disparate impact,"
23 hard stop.

24 They cite to the case of *Nemet Chevrolet* for the
25 proposition that you draw all facts and inferences in favor

1 of the plaintiffs, which is the same case cited by the
2 plaintiffs in their brief when they asked the Court to
3 reverse the dismissal, the disparate impact case at the
4 motion to dismiss stage.

5 So they precisely ask for that relief. The Fourth
6 Circuit precisely said that's the relief that it's providing.

7 The plaintiffs, nonetheless, argue that the Fourth
8 Circuit, without ever saying so, took the extraordinary step
9 of granting partial summary judgment never requested by the
10 plaintiffs.

11 In the cases that we cite, Your Honor, the Fourth
12 Circuit makes clear that that's extraordinary.

13 And if they're going to take that step, they're going
14 to say so.

15 Here, there is nowhere in the opinion they even hint
16 that they're deciding summary judgment issues.

17 In their papers, the plaintiffs refer to quotes from
18 the Fourth Circuit, as we stated, that are out of context.

19 And one of the key issues that we have raised, Your
20 Honor, on this issue is the Fourth Circuit's passing
21 reference to "other evidence." And here's what the Court
22 said:

23 "We know that plaintiff submitted additional stronger
24 statistical evidence in support of their cross motion for
25 summary judgment on the disparate impact theory of liability,

1 which may have been sufficient on its own for the District
2 Court to consider this alternative theory of liability
3 regardless of whether the District Court had determined that
4 the evidence submitted at the motion to dismiss stage was
5 insufficient to satisfy step one's robust causality
6 requirement."

7 What's notable here, Your Honor, is the Fourth
8 Circuit doesn't even identify what evidence it is referring
9 to. It does not state that that evidence is sufficient to
10 satisfy step one. It does not state that it is granting
11 partial summary judgment as to step one. And it does not
12 direct the District Court to grant summary judgment as to
13 step one. If that was the Court's intent, it would have said
14 so.

15 THE COURT: I don't read it as saying that. I read
16 it as saying that I should consider steps two and three as to
17 whether summary judgment should be granted as to that, and I
18 decided no. It seems to me quite clear that with respect to
19 step one, what the Court is telling me is that that, too,
20 fails at summary judgment for the defendants and all three go
21 to trial.

22 What is your view about that, Mr. Dingman?

23 MR. DINGMAN: The Fourth Circuit made no decision on
24 summary judgment at all. And it certainly made no decision
25 as to whether defendants' step one summary judgment arguments

1 were satisfactory or not. In order to come to that
2 conclusion, the Court would have had to have considered the
3 anti-harboring statute arguments, which are nowhere mentioned
4 in its opinions, and it would have had to consider the
5 arguments with respect to Professor Clark and the reliability
6 of his statistical analysis.

7 THE COURT: Let me interrupt you just a moment,
8 Mr. Dingman.

9 I hear what you're saying, and I want you to finish,
10 and I'm going to consider it carefully. But the Fourth
11 Circuit made unmistakably clear that summary judgment on step
12 one, which I had granted, should be vacated. And you're
13 telling me, well, they didn't consider this, they didn't
14 consider that, but you ignore, Mr. Dingman, that I don't sit
15 to discipline the Fourth Circuit, I don't sit to correct the
16 Fourth Circuit; I sit to obey the clear mandate. I don't
17 have authority beyond the mandate. Do I?

18 MR. DINGMAN: No, sir. And the Fourth Circuit made
19 very clear that the reason it reversed the Court's grant of
20 defendants' motion for summary judgment is the Court did not
21 consider at all the disparate impact arguments because the
22 Court had determined those were dismissed at the motion to
23 dismiss stage. So I think the mandate to the Fourth Circuit
24 is quite clear. It reversed for the Court to consider those
25 very arguments at the motion for summary judgment stage

1 because the Court did not consider them previously. And
2 that's exactly what the Fourth Circuit held.

3 And they state in their opinion --

4 THE COURT: Anything further?

5 MR. DINGMAN: I just want to state this quote from
6 the Fourth Circuit's opinion, Your Honor. It says, "We must
7 determine whether the District Court erred in functionally
8 dismissing plaintiffs' disparate impact theory at the motion
9 to dismiss stage. Then, we must determine whether the
10 District Court erred in granting Waples's motion for summary
11 judgment on the FHA claim because it did not consider
12 plaintiffs' disparate impact theory of liability at this
13 stage."

14 It could not be more clear that what the Fourth
15 Circuit said was the Court never took up the disparate impact
16 arguments on the cross motions for summary judgment, and it
17 must now do so, and that's why we have asked the Court to
18 consider all of the arguments, including the step one
19 arguments.

20 THE COURT: All right. Thank you.

21 Now, Ms. Puccinelli, I will hear from you now.

22 MS. PUCCINELLI: Yes, Your Honor.

23 This is Gianna Puccinelli for the plaintiffs.

24 I think we can keep things relatively brief, as the
25 standards governing motions for reconsideration do not permit

1 the Court to reconsider issues that it already considered and
2 decided in the course of its prior ruling, the decision being
3 reconsidered. And that is evident from defendants' own
4 cases, and I'm specifically looking at the *Carlson* case cited
5 in the reply brief filed by defendants, which explicitly
6 states that there are three grounds for amending an earlier
7 final judgment: to accommodate an intervening change in
8 controlling law, to account for new evidence not available at
9 trial, and to correct a clear error of law or prevent
10 manifest injustice. And defendants have not argued that any
11 of those circumstances are present here. As Mr. Dingman
12 acknowledged, he simply rehashed his entire summary judgment
13 argument just now. There are no new arguments being made.
14 There is no new law being identified. There's no new
15 evidence. Indeed, he admitted that all of the arguments that
16 he made regarding step one were made before the Fourth
17 Circuit and disregarded by the Fourth Circuit in its ruling.
18 And this standard is just as applicable to Rule 54 motions
19 for reconsideration as it is Rule 59 motions for
20 reconsideration.

21 Plaintiffs would direct the Court to the case
22 *Integrated Direct Marketing, LLC, v. May*, 2016 WL 7334278.
23 That is an Eastern District of Virginia case, which, applying
24 Rule 54, states:

25 "Nevertheless, when a request for reconsideration

1 raises no new arguments but merely requests the District
2 Court to reconsider a legal issue or to change its mind,
3 relief is not authorized. And that case cites *Pritchard v.*
4 *Wal-Mart Stores, Inc.* which is a federal Fourth Circuit case
5 from 2001.

6 THE COURT: Let me, Ms. Puccinelli, ask you a brief
7 question.

8 MS. PUCCINELLI: Yes.

9 THE COURT: Is it the position of the plaintiffs that
10 this case should proceed to trial on count one, so disparate
11 impact and disparate treatment, because there are facts at
12 issue, disputed facts at issue on all of that?

13 MS. PUCCINELLI: Your Honor, we contend that we're
14 only proceeding to trial on issues --

15 THE COURT: All right, wait. Can you start by saying
16 yes or no?

17 MS. PUCCINELLI: Your Honor --

18 THE COURT: Do you want me to re-ask the question?

19 Let me ask the question again. Is it the plaintiffs'
20 position that this case should now proceed to trial because
21 summary judgment has been granted -- or has been denied with
22 respect to count -- steps two and three, and you think that
23 summary judgment also in effect has been denied for step one,
24 so the case should now proceed to trial on count one, that
25 is, disparate impact and disparate treatment, as the Fourth

1 Circuit suggested? Is that the plaintiffs' position?

2 MS. PUCCINELLI: No, Your Honor. Plaintiffs contend
3 that we should only be proceeding to trial on the disparate
4 impact theory of the Fair Housing Act claim.

5 THE COURT: All right. And as to that, it's the
6 position of the plaintiffs that it should proceed to trial on
7 all three steps of the analysis as identified by the Fourth
8 Circuit?

9 MS. PUCCINELLI: That is correct, Your Honor.

10 THE COURT: All right. Now, with respect to the
11 arguments that I have heard, you might reiterate, just to
12 refresh my recollection, what is the plaintiffs' position on
13 the effect, if any, of the anti-harboring statute on the
14 plaintiffs' claim in this case?

15 MS. PUCCINELLI: Your Honor, plaintiffs' position is
16 that the anti-harboring statute has no place in the analysis
17 on step one. The Fourth Circuit's -- the Fourth Circuit's
18 opinion clearly states, under the first step, the plaintiff
19 must demonstrate a robust causal connection between the
20 defendants' challenged policy and the disparate impact on the
21 protected class. And it goes -- the Fourth Circuit goes on
22 to identify how plaintiffs have done that. And that's either
23 through statistical evidence or other evidence that
24 specifically links the policy at issue with a
25 disproportionate impact on the protected class. And

1 plaintiffs have shown that through evidence produced by
2 defendants themselves and through the testimony of their
3 expert, Professor Clark.

4 And as a quick note, Your Honor may have seen that
5 defendants filed a *Daubert* motion on Professor Clark,
6 implicitly acknowledging that those issues are more
7 appropriately resolved, not in the context of summary
8 judgment, but in the context of pretrial motions like the one
9 that they filed.

10 THE COURT: Yes, I understand all of that. But what
11 I was asking you, Ms. Puccinelli, is: What, if any, goal
12 does the anti-harboring statute play in the analysis of
13 plaintiffs' disparate impact claim?

14 MS. PUCCINELLI: Your Honor, plaintiffs believe that
15 the defendants appropriately argued that issue in the context
16 of step two of the argument. While we obviously disagree
17 that that is an interest that satisfies step two, we
18 acknowledge that there is a dispute of fact as to that point,
19 and it is appropriately relegated to the step two analysis.

20 THE COURT: And what is the factual issue that you
21 think is presented for the jury to decide involving the
22 anti-harboring statute?

23 MS. PUCCINELLI: Well, Your Honor, the primary issue
24 is that plaintiffs believe that defendants have not shown
25 that the anti-harboring statute actually applied to them, nor

1 have they established that they actually considered the
2 anti-harboring statute in developing the policy. We have
3 evidence from defendants' 30(b)(6) witness that states that
4 they had no idea what the anti-harboring statute was when
5 they were developing the policy.

6 So I submit those are the disputes of fact to be
7 resolved with respect to the anti-harboring statute at step
8 two.

9 THE COURT: All right. I think that's a little
10 helpful but not entirely, Ms. Puccinelli. Let me ask you
11 again: What is it that a jury will have to decide at the
12 trial of this case with respect to the anti-harboring
13 statute?

14 MS. PUCCINELLI: They will have to decide whether
15 the -- whether the anti-harboring statute is a sufficiently
16 compelling interest such that it may -- it justifies the
17 policy and is a neutral application of the policy.

18 THE COURT: All right. That's a helpful answer.
19 What instructions --

20 MS. PUCCINELLI: We got there eventually, Judge.

21 THE COURT: Well, what instructions do you anticipate
22 would be given to the jury about how they evaluate whether
23 the defendants' reliance on the anti-harboring statute should
24 be given any weight?

25 MS. PUCCINELLI: Your Honor, they should be

1 instructed to consider whether defendants actually relied on
2 the anti-harboring statute as a justification for creating
3 the policy and applying it in this case to our plaintiffs.
4 In other words, whether it is pretextual --

5 THE COURT: Why couldn't they have --

6 MS. PUCCINELLI: Sorry, Your Honor.

7 THE COURT: Well, all right. It's puzzling to me, if
8 there is any basis for the application of the anti-harboring
9 statute -- there may not be -- I will go back and look at
10 what I have written -- but I'm not sure that if they didn't
11 rely on the anti-harboring statute and it really came up in
12 the course of the litigation rather than in their formulation
13 of the policy, why couldn't they still say, look, that is
14 still a consideration, we didn't realize we'd be put in jail
15 but now we do.

16 MS. PUCCINELLI: Well, Your Honor, that turns to a
17 question of whether, under the application of that law, that
18 they would validly be, as you said, put in jail for violating
19 the anti-harboring statute.

20 But I do think --

21 THE COURT: Yes, but my problem there,
22 Ms. Puccinelli, is that juries don't decide that sort of
23 thing; judges do. I think you will agree, as I think is
24 indisputable, that the anti-harboring statute really played
25 no role in the Fourth Circuit's analysis.

1 MS. PUCCINELLI: Your Honor, they do -- the Fourth
2 Circuit does note that the anti-harboring statute was one of
3 the justifications cited by defendants in the context of step
4 two, but they do not mention it in the context of any other
5 place. Basically, in their factual summation.

6 THE COURT: It seems that one could draw the
7 inference there that the Fourth Circuit was really suggesting
8 that it should all go to the jury. Is that your view,
9 Ms. Puccinelli?

10 MS. PUCCINELLI: Yes, Your Honor. We do believe that
11 all of these issues should go to the jury. It is our
12 position that the Fourth Circuit's opinion is that plaintiffs
13 have presented sufficient evidence to defeat summary judgment
14 as to step one, and it therefore remanded to Your Honor
15 considerations of steps two and three, which Your Honor
16 correctly denied summary judgment on sending everything to
17 the jury.

18 THE COURT: And in that decision that it issued I
19 think it was August 19th, didn't I deal with the
20 anti-harboring statute?

21 MS. PUCCINELLI: Your Honor did mention the
22 anti-harboring statute. I believe Your Honor noted that
23 there is a dispute of fact as to step two regarding the
24 anti-harboring statute.

25 THE COURT: All right. And then you would argue that

1 I already decided that and motion for reconsideration isn't
2 appropriate. That's what you've already said.

3 MS. PUCCINELLI: Yes, Your Honor.

4 THE COURT: All right. Let me give Mr. Dingman a
5 very brief opportunity to respond to all that he's heard,
6 assuming, Ms. Puccinelli, that you have nothing further to
7 add at this point.

8 MS. PUCCINELLI: Your Honor, just very briefly. I
9 wanted to direct Your Honor to -- I believe Your Honor has
10 already appropriately considered this, but scope of the
11 Fourth Circuit's mandate on pages 432 to 433, which states
12 that plaintiffs have established a prima facie case of
13 disparate impact and then remands the case to Your Honor for
14 consideration as to the remaining two steps.

15 THE COURT: But you've already conceded I think
16 correctly, Ms. Puccinelli, that step one should go to the
17 jury, too.

18 MS. PUCCINELLI: Correct. I'm merely pointing that
19 out to state that the Fourth Circuit considered step one on
20 summary judgment and found summary judgment was inappropriate
21 as to that step.

22 THE COURT: All right.

23 MS. PUCCINELLI: And coupled with --

24 THE COURT: Now --

25 MS. PUCCINELLI: -- Your Honor's --

1 THE COURT: Say it again.

2 MS. PUCCINELLI: -- opinion, all of the steps go to
3 the jury.

4 THE COURT: All right. Now, Mr. Dingman, let me give
5 you a brief, let's say, 10 minutes, to respond in any way
6 that you wish, and then I will take a recess in the matter.

7 You may proceed, Mr. Dingman.

8 MR. DINGMAN: Thank you, Your Honor.

9 Let me address the first issue first that was raised
10 by the plaintiffs, which is the authority of the Court to
11 reconsider based on Rule 54(b), and as we cited in our
12 briefs, the Fourth Circuit has held that that is a much more
13 flexible procedure than reconsideration of final judgments,
14 which are the cases that are relied upon by the plaintiffs in
15 Rule 59(e). So this interlocutory order such as we have
16 here, the Court has flexibility to reconsider and modify its
17 order. I think there's no question about that.

18 So the issue that I think has been framed for Your
19 Honor is, at step one, in the anti-harboring statute, you
20 asked plaintiffs' counsel: What is for the jury to decide?
21 And the answer that was provided were two things. Does the
22 anti-harboring statute apply? That's a purely legal
23 question. The jury cannot decide whether the anti-harboring
24 statute, as interpreted by *United States v. Aguilar*, could
25 apply to the defendants. This Court has to make that

1 decision, and I would submit it already has in holding
2 previously that the defendants were right to consider the
3 anti-harboring statute with respect to this policy.

4 The second issue raised was --

5 THE COURT: I think I said it was a consideration; I
6 didn't think I said that it determined the result. And by
7 the way, I didn't say -- I think I said as to step two, not
8 as to step one, but go ahead.

9 MR. DINGMAN: Just so the record is clear, Your
10 Honor -- I don't want to mislead anyone -- that statement
11 that I have quoted was with respect to the Court's denial of
12 granting of the summary judgment motion with respect to
13 disparate treatment because the Court didn't consider
14 disparate impact. But nonetheless, the Court did say that
15 there is no question that given the anti-harboring statute's
16 imposition of liability that a lessor could properly and
17 sensibly inquire into immigration status.

18 In any event, that is a legal issue. The jury cannot
19 decide that legal issue.

20 The only other basis for supposedly allowing that
21 step one argument to proceed to a jury is whether the
22 plaintiffs had this in mind at the time the policy was
23 enacted. The plaintiffs have cited no caselaw that suggests
24 that whether disparate impact claim has been stated turns on
25 whether the issues were all discussed or thought about at the

1 time the policy was enacted. Disparate treatment was
2 dismissed, it was not appealed, and plaintiffs have told you
3 again today it's not going forward, so the motivations and
4 those types of issues are no longer relevant. All that is
5 relevant is whether the anti-harboring statute provides a
6 basis for this policy. And that has to be determined as a
7 matter of law. If it does, then the Court has to conclude
8 that it is not arbitrary, artificial, or unnecessary. And
9 we'd suggest the Court would also have to conclude that the
10 hands of the defendants are tied because they need to comply
11 with the requirements of the anti-harboring statute. Again,
12 that is not an issue for a jury to decide. There is no fact
13 issue for the jury. These are all legal questions.

14 And I would end with one thing, Your Honor. The
15 suggestion, again, from the plaintiffs that the Fourth
16 Circuit took up the step one issues has no basis in the
17 record. There is no discussion by the Fourth Circuit of the
18 anti-harboring statute. There is no discussion as to whether
19 the arbitrary, artificial, and unnecessary requirement has
20 been met as a matter of fact as opposed to a matter of
21 pleading. And that's the difference here. The fact that the
22 Court allowed this case to proceed past the motion to dismiss
23 stage does not mean it has to proceed past the motion for
24 summary judgment stage. And the Court could not be clearer
25 in saying we remand for reconsideration of the cross motions

1 for summary judgment. These issues were not decided by the
2 Fourth Circuit, and the impact of the anti-harboring statute
3 is a legal matter that this Court must decide, and as we have
4 argued, it should decide in favor of the defendants on
5 summary judgment because that is an obvious basis and a very
6 legitimate reason for the policy.

7 THE COURT: All right. Thank you, Mr. Dingman.

8 Let me give Ms. Puccinelli a very, very brief
9 opportunity to respond directly to what you just said.

10 MR. PUCCINELLI: Certainly, Your Honor.

11 Plaintiffs would just argue that defendants
12 briefed -- extensively briefed the issue of whether the
13 anti-harboring statute plays any role into the step one
14 analysis before the Fourth Circuit. The Fourth Circuit
15 disregarded those arguments in reaching its opinion, and
16 defendants should not be entitled to a second bite at the
17 apple as to these arguments before Your Honor when the Fourth
18 Circuit disregarded them.

19 THE COURT: All right. Thank you. I'm going to
20 recess this matter now. It will be about a 10- or 15-minute
21 recess, and I will tell you how I intend to proceed after
22 that.

23 All right. Tanya, put me on mute, please.

24 THE DEPUTY CLERK: Yes, Judge.

25 (Recess)

1 THE COURT: All right. This is Judge Ellis. I am
2 going to take this matter under advisement.

3 I want to thank the parties, Mr. Dingman and
4 Ms. Puccinelli. Your arguments have been very helpful. It's
5 clarified some things for me. I think, really, the motion
6 for clarification goes well beyond the motion for
7 clarification. I'll get to the *Daubert* issues at the
8 appropriate time. This isn't the appropriate time. And I'll
9 issue an order there. I'm going to take the matter under
10 advisement.

11 Let me tell you this: I don't know precisely what
12 I'm going to rule on the motion for reconsideration. I have
13 some idea, but I would rather wait until I reflect on your
14 arguments some additional time. But after I do so, if, as
15 may well be the case, there is a trial, the pandemic has
16 halted trials in the Eastern District of Virginia in civil
17 cases until at least the new year. I have trials going on in
18 criminal cases starting in October, and we won't finish those
19 until we get to the first of the year, and even then we may
20 not. So I can't predict with any certainty how soon this
21 matter is going to come to trial, assuming it does go to
22 trial. I mention that because I think you're entitled to
23 know that, to take into consideration what you may want to
24 do. It is always, of course, open to the parties to find a
25 reasonable, sensible, commercial resolution of this case, and

1 I urge you to do so. And if you need the assistance of a
2 magistrate judge to do that, I would be glad to ensure that
3 that was made available to you for purposes of a settlement
4 conference. But I don't order that, and I don't do it unless
5 both parties want to give it a try because I don't want to
6 waste the magistrate judge's time or your time in a vain
7 effort to try to get something like that done. If it has to
8 be tried, we will of course try it. But what I'm saying to
9 you is it may be some time before we can get to it.

10 Now, we have motions in limine, and my order will
11 also -- a separate order probably -- will also schedule those
12 so that you can make plans about it. I think there was a
13 date set for motions in limine. Am I right, Mr. Dingman,
14 Ms. Puccinelli?

15 MR. SANDOVAL-MOSHENBERG: Your Honor, this is Simon
16 Sandoval-Moshenberg for the plaintiffs. Your Honor has set
17 dates for the pretrial submissions and for the objections
18 thereto but not for motions in limine yet.

19 Your Honor, if I may, plaintiffs would request that
20 this matter be set for a jury trial with the understanding
21 that it's well out in the future -- obviously, the criminal
22 trials take precedence, we understand that completely -- and
23 with the understanding that it may not go forward at the date
24 set, but our preference would be to get a trial on the
25 calendar now if it's possible.

1 THE COURT: You can't do that because I don't know my
2 calendar for the new year. So the answer is no, not yet.

3 MR. SANDOVAL-MOSHENBERG: I understand, Your Honor.
4 Thank you.

5 With regards to the motions in limine, Your Honor,
6 Your Honor has set a schedule such that objections to the
7 witness and exhibit lists are due on the 9th of November. We
8 would suggest that motions in limine be due, say, two or
9 three weeks after that time, Your Honor.

10 THE COURT: All right. Well, I'll have to look at my
11 schedule. I don't think you all can quite
12 appreciate -- although perhaps you can because the pandemic
13 affects your scheduling of things, as well -- but I can't
14 predict with certainty right now that far ahead, so what I
15 will do is that when I issue an order on the motion for
16 reconsideration, I'll consider setting a hearing date and be
17 clear when motions in limine -- and I'll worry about a trial
18 date just as soon as I can, as soon as it appears that I'm
19 able to do it, but as you know, we have not had any criminal
20 trials in the Eastern District of Virginia for months. And
21 they have backed up. And they take precedence. And I'm
22 going to have to deal with that, and I'm sure you all
23 understand that.

24 Thank you very much for your arguments. Again, they
25 have been very helpful.

Stay well.

The Court stands in recess.

(Proceedings adjourned at 5:17 p.m.)

* * * * *

CERTIFICATE OF OFFICIAL COURT REPORTER

I, Patricia A. Kaneshiro-Miller, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Patricia A. Kaneshiro-Miller

October 1, 2020

PATRICIA A. KANESHIRO-MILLER

DATE

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